IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 440 of 2002

For Approval and Signature:

THE HON'BLE MR.JUSTICE J.M.PANCHAL
AND HON'BLE MR.JUSTICE H.B. ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAVINDRAGIRI SUMERGIRI BAVAJI & ANR. - APPELLANTS
Versus
STATE OF GUJARAT – RESPONDENT

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Appearance :
MR US BRAHMBHATT for Appellants.
PMR KT DAVE, APP for Respondent.

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CORAM : THE HON'BLE MR.JUSTICE J.M.PANCHAL
AND HON'BLE MR.JUSTICE H.B. ANTANI

Date : 22/06/2005

ORAL JUDGMENT

(Per : THE HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against

judgment dated April 9, 2002 rendered by the learned Special Judge (NDPS) & Additional Sessions Judge, Veraval, in Sessions Case (NDPS) No.30 of 2000 by which the appellants are convicted under Section 20(b)(ii) of the Narcotic Drugs & Psychotropic Substances Act, 1985 ("the Act" for short) and each is sentenced to R.I. for ten years and fine of Rs.1 Lac, in default S.I. for two years.

2. On or about February 2000, Chhatrasinh Sirshinh Chavda was discharging duties as Police Inspector, Veraval City Police Station. On February 20, 2000, Mr.K.B.Gohel, who was then Police Inspector of Prabhas Police Station, was on leave and, therefore, charge of Prabhas Police Station was handed over to Mr.Chavda. As is usual at Somnath Temple, security arrangements were made at 12.00 noon because offering prayer with a sacred lamp to Lord Shiva was to take place. In order to verify as to whether proper security arrangements were made at the temple or not, Mr.Chavda in the company of Head Constable Mr.Kasambhai and Constable Mr.Mansukhbhai Bachubhai went to Somnath Temple. He found that the devotees entering the temple were being checked with metal detector. Meanwhile, ASI Mr.Sahdevsinh Bhadoriya approached him and informed that belongings of two mendicants, who were entering the temple, were checked and it was found that they were in possession of *charas* and, therefore, they were made to sit in small tent under the supervision of S.R.P. personnel. On receipt of this information from ASI Mr.Bhadoriya, PI Mr.Chavda went to the small tent. On interrogation, each appellant disclosed before Mr.Chavda that the respective t*hailas* carried by them contained *charas.* Therefore, PI Mr.Chavda asked Constable

Mr.Jaisinh Hajabhai to requisition services of two panch witnesses and call a goldsmith with scale to weigh the substances, which may be found from the possession of the appellants. He also asked Constable Jaisinh Hajabhai to bring sealing materials such as sealing wax, seals, twine, etc. After sometime, Police Constable Jaisinh returned with panch witnesses as well as goldsmith Jaisukh Tannabhai and sealing materials. The Police Inspector explained to the panchas and the goldsmith that search of the two mendicants was required to be made as they were allegedly in possession of *charas.* Thereafter, the persons of the Police Officers, panch witnesses and goldsmith Jaisukhbhai Tannabhai were searched, but nothing incriminating was found. The Police Inspector then interrogated the mendicants in presence of panch witnesses and one of them disclosed his name to be Girnarigiri Gurumahakalgiri (the appellant No.2) whereas another disclosed his name to be Ravindragiri Sumergiri Bavaji (the appellant No.1). The Police Inspector also learnt from the appellants that the appellant No.2, i.e. Girnargiri Gurumahakalgiri was residing at Bhavnath Taleti, Junagadh, whereas the appellant No.1, i.e. Ravindragiri Sumergiri was residing at Hrishikesh–Hardwar. The appellants were informed about their right to opt for their search being taken in presence of a gazetted officer or a magistrate as required by Section 50(1) of the Act, but the appellants did not require the Police Inspector to take them before a gazetted officer or a magistrate for search. It was found that Girnargiri was carrying a *thaila* hung on his shoulder. On search of that *thaila,* black coloured substance was found. On smelling, it was found to be *charas.* Police Inspector Mr.Chavda demanded authorization and/or permit from Girnargiri Gurumahakalgiri permitting him to possess *charas,* but Girnargiri could not

produce the same. The substance found was weighed by goldsmith Jaisukbhai Tanna and its weight was ascertained to be 910 gms. From the lump of *charas,* substance of 100 gms. was drawn and the sample was prepared, which was sealed as required by the law. Rest of the substance was placed in a small cloth bag, which was stitched by hands and that small cloth bag was also sealed as required by law. Thereafter, *thaila* carried by Ravindragiri Sumergiri was searched. On search, it was found that black coloured substance was kept in the *thaila.* On smelling, the substance found was ascertained to be *charas.* Its weight was found to be 360 gms. From the said substance also, 50 gms. of *charas* was drawn and the sample was prepared, which was sealed as required by law whereas rest of the substance was placed in a small plastic bag, which was also sealed in presence of panch witnesses. Further, from the *thaila* carried by Ravindragiri, fifty-seven currency notes each of Rs.10/- denomination, were found over and above wooden smocking pipe and pencil shaped piece of brass. Those articles were also seized by Police Inspector Mr.Chavda. Thereafter, a detailed panchnama regarding seizure of *charas* found from possession of the appellants was drawn. The samples drawn and rest of the contraband substances as well as the appellants were handed over to PSO of the Police Station. Mr.Chavda also lodged his complaint. The PSO in turn, informed the Superintendent of Police, Junagadh, that at Prabhas Patan Police Station, a case under the provisions of the Act was registered. Therefore, the Superintendent of Police, Junagadh, asked Mr.Manojbhai Mangalaji Balat, who was then Circle Police Inspector, Dediyavada, to investigate the case. Mr.Balat secured the documents such as copy of First Information Report, Panchnama, etc. and recorded statements of Sahdevbhai Babubhai Bhaduriya, Kasambhai Kanabhai, etc.

The two seized *muddamal* were sent to Forensic Science Laboratory for analysis. Thereafter, further investigation of the case was handed over to Mr.Kiritsinh Bhimsinh Gohel, who was then Police Inspector of Prabhas Patan Police Station. The report of the analysis indicated that the substances analyzed were "*charas*" as defined in the Act. On completion of the investigation, the two appellants were chargesheeted in the Court of learned Judicial Magistrate First Class, Veraval, for commission of offence punishable under Section 20(b) read with 29 of the Act.

3. As the offences punishable under the Act are exclusively triable by a Special Judge, the case was committed to the Court of learned Special Judge & Additional Sessions Judge, Veraval, for trial where it was numbered as Sessions Case (NDPS) No.30 of 2000. The learned Judge to whom the case was made over for trial framed necessary charge against the appellant at Exh.13. The charge was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined; (1) Pravinbhai Govindbhai Vaja as P.W.-1 at Exh.17; (2) Satish Mohanbhai Chavda as P.W.-2 at Exh.19; (3) Chhatrasinh Sirsinh Chavda as P.W.-3 at Exh.20; (4) Jaisukhlal Kantilal Tanna as P.W.-4 at Exh.36; (5) Dhanabhai Khusalbhai Patel as P.W.-5 at Exh.37; (6) Dalpatgiri Bhavgiri Goswami as P.W.-6 at Exh.38; (7) Kasmabhai Kanabhai Rajvani as P.W.-7 at Exh.39; (8) Jaising Gajabhai Damor as P.W.-8 at Exh.70; (9) Udesinh Makanji Rathod as P.W.-9 at Exh.71; (10) Sahdevsinh Diliramsinh Bhadoriya as P.W.-10 at Exh.74; (11) Ramdevsinh Takhubha Zala as P.W.-11 at Exh.75; (12) Manojbhai Mangalaji Balat as P.W.-12 at Exh.76; and, (13) Kiritsinh Bhimsinh

Gohil as P.W.-13 at Exh.78, to prove its case against the appellants. The prosecution also produced documentary evidence such as Identification Card of the appellant No.2 seized during the search of the appellant No.2 at Exh.18; panchnama indicating seizure of contraband item from the possession of the appellants at Exh.21; copy of information conveyed to the relatives of the appellants about their arrest at Exh.22; certificate issued by the goldsmith for having weighed the contraband substances at Exh.23; forwarding letter with which *muddamal* was sent to Forensic Science Laboratory for analysis at Exh.24; complaint lodged by PI Mr.Chavda at Exh.26; different seizure memos at Exhs.28 to 34; intimation given by the Police Officer for registering the offences under the NDPS Act at Exh.41; extract of necessary entry from Police Station Diary at Exh.49; report of Forensic Science Laboratory at Exh.77; report of analysis at Exh.80; memorandum indicating communication of grounds arrest to the appellant No.2 at Exh.82; similar memorandum prepared in respect of the appellant No.1 at Exh.83 etc. in support of its case against the appellants.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code. In further statement, each appellant claimed that a false case was filed against him. However, no defence evidence was adduced by any of them.

5. On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that on February 20, 2000, the appellant No.1 was found to be in possession of 360 gms. Of *charas* whereas the appellant No.2 was found to be in possession of 910 gms. of *charas* without pass or permit and they committed offence punishable under Section 20(b) of the Act. The learned Judge thereafter heard the appellants and their learned advocates as well as the learned Additional Public Prosecutor on the question of sentence and after hearing all the concerned, the learned Judge has convicted the appellants under Section 20(b) of the Act and imposed sentences referred to earlier by judgment dated April 9, 2002 giving rise to instant appeal.

6. Mr.U.S.Brahmbhatt, learned counsel of the appellants, has urged three points for consideration of this Court. The first point argued by the learned counsel of the appellants is that mandatory provisions of Section 50 of the Act are not complied with and, therefore, conviction is vitiated. The second point urged is that panch witnesses have turned hostile as a result of which, the learned Judge of the trial Court was not justified in placing reliance on interested version of the Police Officers for the purpose of convicting the appellants under Section 20(b) of the Act and, therefore, the appeal should be accepted. The last point, in alternative, urged is that the appellants were found to be in possession of the quantity of *charas* lesser than commercial quantity, but greater than small quantity and, therefore, in view of Section 20 of the Act, which confers discretion on the Court to impose sentence of R.I. upto ten years,

punishment of sentence undergone by the appellants should be imposed on them in view of small quantities found from their possession.

7. Mr.K.T.Dave, learned Additional Public Prosecutor for the State, contended that in this case, persons of the two appellants were not searched and, therefore, the provisions of Section 50 of the Act will not apply to the facts and circumstances of the case in view of decision of the Supreme Court in **State of H.P. vs. Pawan Kumar, (2005) 4 SCC 350.** In the alternative, it was contended by him that the testimony of PI Mr.Chavda satisfactorily establishes that requirements of Section 50 of the Act were complied with by him and, therefore, the appellants are not entitled to any benefit of doubt on the ground that mandatory provisions of Section 50 of the Act were not complied with. The learned counsel for the State submitted that a bare reading of testimonies of panch witnesses makes it clear that they were throughly unreliable and, therefore, the learned Judge of the trial Court was justified in placing reliance on reliable evidence of the Police Officers for the purpose of coming to the conclusion that *charas* was found from the possession of each appellant. Dealing with the argument advanced by the learned counsel of the appellants regarding sentence to be imposed, the learned Additional Public Prosecutor for the State drew attention of this Court to the decision of the Supreme Court in **Union of India vs. Kuldeep Sing, (2004) 2 SCC 509,** and pleaded that having regard to the salutary objects sought to be achieved by the Act and failure on the part of the appellants to point out mitigating factors to reduce the sentences imposed on them by the trial Court, the

sentences imposed by the trial Court should be confirmed by this Court.

8. This Court has heard Mr.U.S.Brahmbhatt, learned counsel of the appellants, as well as Mr.K.T.Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. The plea that the mandatory provisions of Section 50 of the Act are not complied with and, therefore, conviction of the appellants under Section 20(b) of the Act should be set aside, is devoid of merits. Admittedly, what was searched by PI Mr.Chavda were *thailas* belonging to the appellants. Their persons were not searched at all. In **State of H.P. v. Pawan Kumar (supra),** the Supreme Court has, after referring to law on the subject, authoritatively ruled as under:

> "*A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given separate name and are identifiable as such. They cannot even remotely be treated to be part of the body as a human body. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension and or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder,*

> *back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act."*

In view of abovereffered to authoritative pronouncement of law by the Supreme Court, this Court is of the firm opinion that the provisions of Section 50 of the Act are not attracted to the facts of instant case. It is not the case of the appellants that their persons were searched and such search resulted into find of *charas* by PI Mr.Chavda. The evidence on record clinchingly establishes that what was searched were *thailas* belonging to the appellants. Therefore, the plea based on Section 50 of the Act cannot be accepted and is hereby rejected.

10. In the alternative, this Court finds that the testimony of PI Mr.Chavda, which is found to be cogent, reliable and consistent, establishes that requirements of Section 50 of the Act were complied with by him before effecting search of *thailas* belonging to the appellants. In his examination-in-chief, PI Mr.Chavda has asserted that he had made the appellants aware about their right of being searched in presence of a magistrate or a gazetted officer and shown willingness to take them before a magistrate or a gazetted officer for search, but the appellants had declined the said offer. PI Mr.Chavda stands corroborated by other Police Officers examined in the case. Though PI Mr.Chavda has been searchingly cross-examined at length, nothing could be brought on record to impeach his credibility. Under the circumstances, this Court is of the opinion that it is satisfactorily established by the prosecution that the provisions of Section 50 of the Act were complied with. Therefore, no benefit of doubt can be given to the appellants

on the basis that mandatory provisions of Section 50 of the Act were not complied with.

11. The plea that panch witnesses have not supported the case of the prosecution and, therefore, the appellants should be acquitted after disbelieving interested versions of the Police Officers, is merely stated to be rejected. It is well settled that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution cannot be thrown overboard as unreliable. It must be realized that the phenomenon of panch witnesses turning hostile is not unknown and is ever on the increase. It needs hardly to be emphasized that the decision of a case does not depend solely on the question whether the panch witnesses support or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of reliable evidence of independent witnesses including Police Officers, in theory, it would be giving a right of *veto* to the panchas so far as question of culpability of an accused is concerned. Such a course is not permissible in law. If the evidence of Police Officer is otherwise found to be true and dependable, judicial pragmatism requires that merely because the panchas do not support, it should not be made a ground to discard the evidence of the police officer. Further, if one examines the testimony of panch witness Pravinchandra Govindbhai Vaja, examined at Exh.17, it becomes evident that he has no regard for truth. In his examination-in-chief, he has stated that he had signed only panchnama. It was not his case that he had also signed slips which were placed at the time when the samples were drawn. During the course of cross-examination, he was confronted with those slips bearing his signature and he had to admit that those slips were signed by him. There is

no manner of doubt that he has stated false facts before the Court to oblige the defence. Similarly, testimony of second panch witness is also not reliable whereas the evidence tendered by the Police Officers is found to be quite clear, consistent and implicitly reliable. The learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, did not commit any error in placing reliance on the evidence tendered by the Police Officers for the purpose of coming to the conclusion that it was proved by the prosecution beyond reasonable doubt that the appellants were found to be in possession of *charas* without pass or permit notwithstanding the fact that the panchas did not support the prosecution. Having regard to the facts of the case, this Court is of the opinion that the impugned judgment cannot be set aside on the ground that the panchas did not support the prosecution.

12. The last plea based on sentence to be imposed deserves to be considered favourably by this Court in view of the amendment made in the Act by Act No.9 of 2001. Section 20 of the Act, as substituted by Act No.9 of 2001, came into force with effect from October 2, 2001. The judgment impugned in instant appeal was delivered by the learned Judge on April 9, 2002. Therefore, there is no manner of doubt that in view of the provision of Section 41 of the Act No.9 of 2001, instant case was required to be disposed of in accordance with the provisions of the Principal Act as amended/substituted by Act No.9 of 2001. Section 20(b)(ii)(B) of the Act, *inter alia,* provides that a person found in possession of cannabis can be sentenced with R.I. for a term up to ten years and with fine which may extend to one lac

rupees if the possession involves quantity lesser than commercial quantity but greater than small quantity. In exercise of powers conferred by Clauses (vii-a) and (xxiii-a) of Section 2 of the Act and in supersession of Ministry of Finance, Department of Revenue Notification S.O. 527(E), dated July 16, 1996, the Central Government has specified the quantity mentioned in Columns 5 and 6 of the Table in relation to the narcotic drugs or psychotropic substances mentioned in the corresponding entry in Columns 2 to 4 of the said Table, as the small quantity and commercial quantity respectively for the purpose of the said clauses of that Section. Entry No.23 of the Table indicates that as far as *charas* is concerned, small quantity specified is 100 gms. and commercial quantity specified is 1 kg. Admittedly, the appellant No.1 was found to be in possession of 360 gms. of *charas* whereas the appellant No.2 was found to be in possession of 910 gms. of *charas* meaning thereby the quantity found from the possession of each appellant was lesser than commercial quantity, but greater than small quantity and, therefore, the Court has discretion to impose sentence. As explained by the Supreme Court in **Union of India vs. Kuldeep Singh (supra),** discretion in determination of quantum of punishment is required to be exercised judiciously and judicially. The Court must also keep in view right of the victim of crime and society at large. Having regard to the facts and circumstances of the case as well as aggravating circumstances, which were pointed out by the learned Additional Public Prosecutor and the mitigating factors, which were pointed out by the learned counsel of the defence before the trial Court, this Court is of the opinion that interest of justice would be served if the appellants are sentenced to R.I. for eight years and fine of Rs.1 Lac, in

default R.I. for one year for commission of offence punishable under Section 20(b) of the Act.

13. For the foregoing reasons, the appeal partly succeeds. The conviction of the appellants under Section 20(b) of the Act recorded by the learned Judge of the trial Court vide judgment dated April 9, 2002 rendered in Sessions Case (NDPS) No.30 of 2000 is maintained and hereby confirmed. However, the sentence imposed on each appellant by the trial Court is hereby modified. Each appellant is sentenced to R.I. for eight years and fine of Rs.1 Lac, in default R.I. for one year, for commission of offence punishable under Section 20(b) of the Act. The appeal is partly allowed to the extent indicated hereinabove. *Muddamal* be disposed of in terms of the directions given by the learned Judge of the trial Court in the impugned judgment.

(J.M.PANCHAL, J.)

(H.B.ANTANI, J.)

Rajendra